No. 49563-5-II

**COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON**

FRANK PORTMANN, Appellant

v.

SALLY HERARD, Respondent.

APPELLANT'S REPLY BRIEF

David M. Newman, WSBA #24113
Co-counsel for Appellant

The Rainier Law Group, PLLC
PO Box 7328, Bellevue WA 98008-1328
12356 Northup Way, Suite A, Bellevue WA 98005

Phone: 425-748-5200
Email: newman@rainierlaw.com

Nathan James Neiman, WSBA #8165
Co-counsel for Appellant

Neiman Law Offices
PO Box 777, Redmond WA 98073-0777
8201 164th Ave NE, Suite 200, Redmond WA 98052

Phone: 425-881-3680
Email: nneimail@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Rules

Introduction

Respondent Herard toils in her response to exclude the testimony of Eric Pickle and dismiss the significance of relevant circumstantial evidence offered by Appellant Portmann. The testimony and other evidence are admissible and relevant, and raise issues of material fact precluding summary judgment.

Herard recognizes that an agreement to make mutual wills may be found outside the wills themselves. She therefore is compelled to defend by offering the testimony of Attorney Gaylerd Masters concerning the states of mind of decedents Glen Morse and Donald Cross, and the circumstances of their estate-planning conferences. Herard's reliance on Attorney Masters' testimony to rebut Portmann's evidence and argument illuminates a truth: the issues in this case must be resolved by a fact-finder who sees and hears witnesses testify at trial.

Argument

1. The trial court's redaction of Eric Pickle's declaration is subject to review.

In response to Appellant Portmann's Assignment of Error No. 1, concerning the trial court's exclusion of six paragraphs from the Eric Pickle declaration, Respondent Herard offers two arguments:

First, Herard argues that Portmann failed to preserve the issue for consideration on appeal. Second, that the stricken portions of the declaration are not admissible under ER 803(a)(3), regarding exceptions to the rule against hearsay. Herard's response fails to answer Portmann's analysis that Eric Pickle is not a party in interest and therefore his testimony should not be stricken under RCW 5.60.030, the Deadman Statute.

1(a). Under the de novo standard, all evidentiary rulings by the trial court are subject to review.

As noted in appellant's and respondent's briefs, an appellate court's review of a trial court's summary judgment is de novo.

> An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.[1]

[1] *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (citations omitted).

"We review de novo all trial court rulings, including evidentiary rulings, made in conjunction with a summary judgment dismissal order."[2]

Under the de novo standard, this Court may and should consider the paragraphs stricken from the declaration and reach its own conclusion about admissibility.

Herard asks the Court to refuse consideration of this issue under RAP 2.5(a). RAP 2.5(a) is inapplicable. However, if it did apply to this situation, it does not compel the Court to refuse consideration. By its own terms, RAP 2.5(a) is permissive: "The appellate court may refuse to review any claim of error which was not raised in the trial court." But as the cases cited above make clear, de novo review requires review of all trial court evidentiary rulings made in a summary judgment proceeding.

Herard's claim that Portmann failed to object in the trial court to the striking of paragraphs is a distracting diversion that ignores the standard of review as stated by *Folsom*. Portmann's counsel raised the issue and the trial court promptly engaged counsel in a lively colloquy that moved quickly to numerous other issues.[3] At the conclusion of the hearing, Portmann's counsel objected to the entry of any findings of fact or conclusions of law, which included explicit references to the content

---

[2] *Fedway Marketplace West, LLC v. State*, 183 Wn.App. 860, 870, 336 P.3d 615 (Div. 2 2014) (citations omitted).

[3] RP 12-25.

stricken from the declaration.[4] Portmann addressed the issue before the trial court. The record sufficiently reflects the argument and the trial court's evidentiary ruling. De novo review of that evidentiary ruling is precisely what Herard labors to avoid and de novo review is Portmann's right on this appeal.

1(b). Before this Court, Herard argues that Eric Pickle's declaration regarding the decedents' states of mind is not relevant. Before the trial court, Herard argued that the declaration was highly relevant.

In her trial-court brief on the Deadman Statute (CP 280-83) Herard urged the trial court to believe that the statements she wanted stricken from Eric Pickle's declaration were relevant to the questions before the trial court:

> Likewise, paragraphs 5, 6, 7, 8, 9, and 11 of the Declaration of Eric Pickle references communications and transactions he purportedly had with Donald Cross, Glen Morse, and Donna Warter. All of these individuals are deceased and the *communications and transactions referenced by the declarant*[5] *are relevant to the estate planning of Donald Cross and Glen Morse*.
> . . .
> The Pickles continuously reference conversations with deceased individuals regarding *statements and*

[4] RP 30-31.
[5] The "declarant" in this instance is not Eric Pickle. Eric Pickle is the witness reporting the out-of-court statements of declarants Cross, Morse, and Warter. But Herard was correct that the statements are relevant.

> *transactions that are relevant to will changes and testamentary intent*.[6]

On appeal, Herard does an about-face and argues before this Court that the statements are *not* relevant.[7] By reversing her position, Herard shows her lack of faith in her own evidentiary arguments. Lacking that confidence, Herard now attacks relevance. Herard's concern that her evidentiary arguments will not withstand de novo scrutiny is very appropriate.

Assuming for the purpose of this discussion that Eric Pickle's testimony is not barred outright by the Deadman Statute,[8] the Court must determine whether the out-of-court statements by Morse and Cross, as related by Eric Pickle, are admissible under ER 803(a)(3), which permits the introduction of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . ." The disputed content of the declaration concerns Eric Pickle's recollection of statements by Cross and Morse about their own wills, estate planning, and how they understood the wills would operate. Some of the disputed

[6] CP 282-83 (emphasis supplied).
[7] Brief of Respondent at 10-13.
[8] The Brief of Respondent fails to address Portmann's analysis that the Deadman Statute is inapplicable. By failing to address that issue, Herard should be deemed to have abandoned her argument to the trial court that the Deadman Statute bars portions of Eric Pickle's declaration.

content provides essential context for Eric Pickle's recollection and testimony. The disputed content is evidence of an oral agreement between Cross and Morse that their wills were mutual, or the disputed content is evidence of their understanding about how their coordinated wills would operate to distribute the survivor's estate after both had died. Of particular interest are paragraphs 7 and 8, in which Eric Pickle related that he received and reviewed a copy of Cross' January 5, 1998, will:

> 7. . . . As I understood the will, if Don were to survive Glen, then upon Don's death one half of his estate would go to Glen's family.
>
> 8. In subsequent conversations, Don and Glen emphasized to Sherrie [Pickle] and me the fundamental feature of their agreement in their plan: half of the survivor's estate going to the other's family members. Both men told us that this was their agreement.[9]

"[H]earsay evidence is admissible if it bears on the declarant's state of mind and if that state of mind is an issue in the case."[10] The statements by Cross and Morse to Eric Pickle are statements of the declarants' then-existing states of mind. They are statements of the declarants' intent, plan, motives, and design. The statements concern the agreement between Cross and Morse and their explanation of how they understood their wills would operate, which is the single issue in this case. Accordingly, the

[9] CP 254.
[10] *State v. Terrovona*, 105 Wn.2d 632, 637, 716 P.2d 295 (1986) (referring to ER 803(a)(3) and Fed. R. Evid. 803(3)).

statements related by Eric Pickle are not excluded by the rule against hearsay, and are admissible under ER 803(a)(3) as exceptions to the rule. The trial court erred in striking the content of Eric Pickle's declaration. Consideration of Eric Pickle's declaration is in direct conflict with Masters' testimony. That conflict raises a genuine issue of material fact which requires denial of Herard's summary judgment motion.

2. Portmann offers both direct and circumstantial evidence which is admissible and relevant on the issue of contractual intent.

Herard claims that Portmann's case is "totally dependent on inferences and lacks any true basis in fact." [11] Herard's argument ignores Portmann's direct evidence and disregards Portmann's circumstantial evidence; circumstantial evidence that must be considered to apply the written instrument to the parties.

Portmann's evidence is sufficient to defeat Herard's summary judgment motion because it raises questions of material fact. The issue is whether Cross, by the careful coordination of his will with Morse's will, or by collateral oral agreement, was irrevocably bound when Morse died and Cross accepted the benefit of Morse's will.

Portmann's evidence of record includes:

[11] Brief of Respondent at 17.

*The wills executed by Cross and Morse in 1992, 1995, and 1998, which are themselves the objective written manifestation of their agreement to divide the survivor's estate between their two families;

*The declaration of Eric Pickle, in which he recalls statements made to him by Cross and Morse about their agreement and their plan;

*The deeds by which they acquired real property, which trace a transformation over time from divisible tenancies in common to joint ownership with right of survivorship, showing an equalization of their economic interests;

*The declarations of Frank Portmann, Sherrie Pickle, and Peggy Dessen, which provide context, showing the devotion of Cross and Morse to one another's families during their lives, without which an agreement by the men to benefit both families with the survivor's estate would be incongruous.

Contrary to Herard's insinuation, Portmann is not relying on "mere allegations or denials from the pleadings."[12] Portmann has provided evidence, not "conclusory statements," as Herard implies.[13]

The declaration of Eric Pickle contradicts Masters' testimony creating a genuine issue of fact. Eric Pickle's declaration considered in conjunction with circumstantial evidence concerning patterns of

[12] Brief of Respondent at 14.
[13] Brief of Respondent at 15.

benevolences, the manner of taking and holding title to real property, and the evolution of the wills prior to the death of Morse, present strong evidence requiring trial. This is consistent with controlling authority: With respect to the formation of an agreement to make mutual wills, "[t]he existence of a contractual intention is ordinarily a fact question to be resolved by the trier of the facts." [14] Intent is a question of fact,[15] and a fact-finder may infer intent from conduct.[16]

"[I]n determining a case of this kind, we must refer to the facts and circumstance of other similar cases, yet each case must rest upon its own peculiar facts and circumstances."[17] In the *Arnold* case, the evidence offered to prove an agreement to make mutual wills consisted primarily of the testimony of the lawyer who prepared the wills. The court did not find the lawyer's testimony convincing, and did not find mutuality. In *Auger v. Shideler*,[18] the evidence included testimony of the lawyer who drafted the wills, the testimony of a friend of the husband and wife who acted as a witness to the execution of the wills, and the testimony of an adverse

[14] *In re Estate of Richardson*, 11 Wn. App. 758,761, 525 P.2d 816 (Div. 2 1974).
[15] *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 290, 337 P.3d 328 (Div. 2 2014).
[16] *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).
[17] *Arnold v. Beckman*, 74 Wn.2d 836, 843, 447 P.2d 184 (1968).
[18] *Auger v. Shideler*, 23 Wn.2d 505, 161 P.2d 200 (1945).

party. The *Auger* court found mutuality, although the testators never used the word "mutual" when conferring with their lawyer.[19]

> Viewing, weighing, and considering the evidence as a whole, and drawing the inferences we deem justifiable and proper, we find that it meets the prescribed test and warrants and requires a finding that Mr. & Mrs. Horch, prior to the time of making their wills, had an agreement as to the disposition of their property and to make wills carrying their agreement into effect.[20]

The appropriate inquiry for this Court is a totality-of-facts-and-circumstances inquiry. At summary judgment the court must consider the facts, and the reasonable inferences from the facts, in the light most favorable to the nonmoving party.[21] Viewed in that light, Portmann's direct and circumstantial evidence could lead a reasonable trier of fact to find contractual intent. Summary judgment was improper.

3. Mutual wills need not be identical, but the 'Plan B' alternative bequest provisions of the decedents' final wills were mirror images.

Herard challenges Portmann's claim by pointing out that the wills executed by Cross and Morse were not identical.[22] Herard also attacks Portmann's reliance on the Supreme Court's observation[23] in *Cummings v*

[19] *Auger*, 23 Wn.2d at 511.
[20] *Auger*, 23 Wn.2d at 512-13.
[21] *Jones v. Allstate Ins. Co*., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).
[22] Brief of Respondent at 7; CP 39, 43, 46; RP 7-9.
[23] Brief of Respondent at 17-18.

Sherman that: "The wills were alike in all essential details."[24] The point of Portmann's citation to *Cummings* is that the court found mutuality even after observing that the wills were not identical. Herard cites no authority which establishes that mutuality is precluded if the wills are not identical.

The Cross and Morse wills were not identical. But a close comparison of the will executed on January 5, 1998, by Cross with the will executed on September 18, 1998, by Morse, shows that the plans for distributing the survivor's estate were exactly congruent:[25]

Glen Morse will **Executed September 18, 1998**	**Donald Cross will** **Executed January 5, 1998**
If Morse survives Cross:	If Cross survives Morse:
Marvin Herard art to Marvin and Sally Herard	Marvin Herard art to Marvin and Sally Herard
Residue:	Residue:
1/2 to: Minnie Campbell (sister) & Darlene Portmann (niece) & Eric Portmann (gr-nephew) & Frank Portmann (gr-nephew)	1/2 to: Minnie Campbell (Morse sister) & Darlene Portmann (Morse niece) & Eric Portmann (Morse gr-nephew) & Frank Portmann (Morse gr-nephew)
1/2 to: Donna Warter (Cross sister) & Sally Herard (Cross sister)	1/4 to Donna Warter (sister) 1/4 to Sally Herard (sister)

[24] *Cummings v. Sherman*, 16 Wn.2d 88, 90, 132 P.2d 998 (1943).
[25] CP 71-81 and CP 151.

Even more interesting is a comparison of Morse's September 18, 1998, will with the draft will prepared for Morse during January 1998[26] by Attorney Masters. In the January draft (which never was executed) Morse proposed specific bequests of $50,000, with the residue going to Cross. When Morse returned to Masters' office and executed the September 18, 1998, will, he included specific bequests of $28,000 instead of the $50,000 he had proposed in the earlier draft. This change increased the potential residual benefit to Cross by $22,000 and brought the men's two 1998 wills even closer to perfectly equal distributive plans.

Although the 1998 executed wills of the two men, which were in effect when Morse died, were not identical to the last comma, they provided equally for the partners' families upon the death of the second partner. This final expression of their estate plan, and the evolution of their plan, as seen in earlier wills, is powerful evidence of their agreement about how the residual estate would be divided when both were gone.

4. The Court must consider surrounding circumstances to resolve a latent ambiguity in the wills or to demonstrate the existence of a collateral agreement.

Herard devotes nearly six pages of her response to address Portmann's analysis concerning ambiguities in wills and consideration of

[26] CP 185-88.

surrounding circumstances.[27] The attention Herard devotes to this issue underscores its significance. Herard starts by addressing ambiguities and surrounding circumstances and then drifts into a discussion of oral contracts. Portmann submits that treatment of an ambiguity in a written contract is separate and distinct from the law applicable to oral contracts. In this section, Portmann answers Herard's attempt to avoid the law applicable to the construction of written documents when an ambiguity is found. Later, Portmann will distinguish oral contracts from ambiguous contracts.

Before addressing Herard's analysis of *In Re Estate of Bergau*[28] the necessary starting point is this: Washington law does not require that the agreement to make mutual wills be contained in the will.[29] The holding that the agreement to make mutual wills need not be contained in a will presents an obvious challenge: How should a will be interpreted and applied to the parties, if the agreement to make mutual wills is not contained in the will? That challenge has brought this case to this Court for review. Ms. Herard correctly argues that:

> *If possible*, the testator's intent should be derived from the four corners of the will and the *will must be considered in its entirety*. When, after reading the will in its entirety, *any*

[27] Brief of Respondent at 18-24.
[28] *In re Estate of Bergau*, 103 Wn. 2d 431, 693 P. 2d 703 (1985).
[29] See Brief of Appellant at 14-15, *citing Newell v. Ayers*, 23 Wn. App. 767, 769-70, 598 P.2d 3 (1979).

> *uncertainty arises about the testator's intent*, extrinsic evidence . . . may be admitted to explain and resolve the ambiguity.[30]

However, confining the examination to the four corners of the will may be insufficient, because *Newell* allows the testator to state the agreement to make mutual wills outside the four corners of the document.[31] Herard fails to explain what happens when an examination of the four corners of the will is inadequate to comprehend a separate agreement to make mutual wills. Herard's approach to reconciling the four-corner doctrine with the law allowing a separate agreement for mutual wills is fascinating.

Herard claims the wills in this case have no ambiguous provision, but then Herard abandons reliance on the four-corner doctrine and presents extensive testimony by Attorney Masters. The testimony presented by Herard, consists of Mr. Masters' understanding of out-of-court statements of the decedents. Herard presents Mr. Masters' testimony to establish the decedents' state of mind and intent. Claiming no ambiguity, she presents testimony to establish intent, apparently to defeat the inference of an agreement to make mutual wills. Herard's inconsistency is obvious:

---

[30] Brief of Respondent at 19-20 (emphasis supplied), *citing In Re Estate of Mell*, 105 Wn. 2d 518, 524, 716 P. 2d 836 (1986).

[31] "The agreement and the will *may* be combined in one document." *Newell*, 23 Wn. App. at 769 (emphasis supplied).

First, if Herard truly believed that the intent could be determined from the four corners of the will, why would she present testimony by Mr. Masters concerning the decedents' intent?

Second, Herard presents Mr. Masters' recollection of the decedents' out of court statements to prove state of mind while simultaneously objecting that Eric Pickle's testimony offered for precisely the same purpose should be excluded. With that background, we return to. Herard's analysis of *Bergau*.

Herard argues *Bergau* is distinguishable from this case.[32] Herard summarizes the facts of *Bergau* and stresses the court's determination that the term "fair market value" as used in the will could not be determined from the language of the will "as fair market value could have several connotations."[33] Stressing the vagary of "fair market value," Herard concludes that *Bergau* is inapplicable because it is "not an oral contract/mutual will case."[34] *Bergau* is not an oral contract/mutual will case; however, it provides necessary guidance concerning the proper method of resolving ambiguities in wills.

Although *Bergau* addressed a patent ambiguity, the same rules of construction apply to a latent ambiguity. Herard ignores this distinction.

---

[32] Brief of Respondent at 19.
[33] Id.
[34] Id.

Herard cites *Mell* for the holding: "If possible, the testator's intent should be derived from the four corners of the will and the will must be considered in its entirety."[35] The quoted language is important for two reasons. *First*, sometimes it is not possible to determine the meaning from the four corners of the will. *Second*, the will must be "considered in its entirety." Portmann is not required to prove an oral agreement if a fair reading of the wills presents a latent ambiguity. Stated differently, a latent ambiguity does not require proof of an oral agreement to resolve that latent ambiguity. A latent ambiguity is one that becomes apparent when applying the instrument to the facts, surrounding circumstances, and the parties as they existed at the time the wills were executed.[36]

When the wills of these life partners are read together and compared, it is undeniable that each will contained similar provisions requiring each partner to provide bequests to the other's family members. On summary judgment, Portmann was entitled to a reasonable inference requiring the conclusion that a latent ambiguity existed. The ambiguity occurred because the testators omitted to expressly state their agreement to make mutual wills, which omission is permissible, according to *Newell*.[37] Confronted with the pattern of gifting, evolving provisions unifying the

[35] Id., *citing In Re Estate of Mell*, 105 Wn. 2d 518, 524, 716 P. 2d 836 (1986).
[36] *Bergau*, 103 Wn. 2d at 436.
[37] *Newell*, 23 Wn. App at 769.

mutuality of the wills and the manner of holding title to real property, the latent ambiguity becomes apparent when applying the instruments to the facts as they existed at the time Cross and Morse executed the wills.

If Herard is confident that no latent ambiguity exists, why does she quote Mr. Masters at length concerning the state of mind and intent of Cross and Morse? When Herard chose to present Mr. Masters' testimony concerning intent, she invited consideration of extrinsic evidence to resolve a latent ambiguity.

Likewise, Portmann takes the position that consideration of extrinsic evidence is necessary to resolve a latent ambiguity. If a latent ambiguity exists, and if that ambiguity can be resolved by the Court's consideration of extrinsic evidence, then there is no need to prove an oral agreement. However, if proof of a collateral oral agreement to make mutual wills is deemed necessary, the record contains sufficient evidence to create genuine issues of material fact requiring trial.

Herard's attempt to confine the inquiry to the four corners of the instruments is inappropriate and Herard knows it, which is why she relies on Mr. Masters' testimony while objecting to Eric Pickle's testimony. Herard invited consideration of extrinsic evidence by presenting Mr. Masters' testimony.

5. The unusual 'Plan A / Plan B' distributive scheme can be understood only if the wills are deemed mutual.

One cannot overstate the significance of the alternative bequests appearing in the 1992, 1995, and 1998 wills. Attorney Masters, who testified that he drafted all of the wills, characterized these alternative plans as Plan A and Plan B.

Plan B does not supplement Plan A; it revokes Plan A and expresses an entirely different distributive scheme. Unless the partners wanted to control how the survivor's estate would be distributed, Plan B would be unnecessary. Nothing explains Plan B except an agreement by the two testators to bind themselves to the plan.

Of the six executed wills[38] in evidence, only one does not revoke Plan A when the testator is the survivor. That is Morse's final will, executed September 18, 1998. But even that will contains a Plan B which exactly matches the Plan B of Cross' 1998 will. The absence of a revocation provision in Morse's last will is insignificant, because there is no assurance that the survivor's estate will hold any asset for distribution under Plan B. Under all six wills, the surviving partner was to receive the residue of the deceased partner's estate with no restriction on its use. The

[38] The 1992, 1995, and 1998 wills, not the wills executed by Cross following Morse's death.

survivor was free to spend it all. The partners' families were to benefit under Plan B only if the survivor were to conserve the estate.

When the testators made their wills, they must have known that when the survivor died there might be little or nothing left to distribute. Yet they included Plan B so that their families would benefit equally *if* anything remained. Only a conscious agreement by Cross and Morse could have produced such a symmetrical plan, and the wills themselves are evidence of the agreement.

Conclusion

Lacking a writing which explicitly announces itself as an agreement by Morse and Cross to make mutual wills, the fact-finder in this case must be informed not only by the wills themselves, but also by extrinsic evidence in the form of witness testimony and documents concerning facts and circumstances known to exist when the testators executed the wills. The trial court's decision and attorney-fee award should be vacated and the case remanded for further proceedings.

Respectfully submitted: 07-24-2017

David M. Newman, WSBA #24113
Co-counsel for Appellant

TELEPHONIC APPROVAL
24113

Nathan James Neiman, WSBA #8165
Co-counsel for Appellant

Certificate of Service

On July 24, 2017, I delivered a copy of the Brief of Appellant to Respondent's counsel, Heather Crawford, via email addressed to:

hc@balsamlaw.com

Counsel for the parties have stipulated to exchange of pleadings and correspondence via email.

I declare under penalty of perjury that the foregoing is true and correct. Signed at Bellevue, Washington, on the date written below.

07-24-2017
Date

David M. Newman

THE RAINIER LAW GROUP PLLC

July 24, 2017 - 11:20 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49563-5
Appellate Court Case Title:	In re the Estate of Donald Lewis Cross
Superior Court Case Number:	15-4-02146-2

The following documents have been uploaded:

- 4-495635_Briefs_20170724111753D2971523_2804.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was 20170724 Appellants reply brief No 49563 5 II.pdf

A copy of the uploaded files will be sent to:

- Dryan4249@aol.com
- cmb@balsamlaw.com
- hc@balsamlaw.com
- nneimail@aol.com

Comments:

Sender Name: David Newman - Email: newman@rainierlaw.com
Address:
PO BOX 7328
BELLEVUE, WA, 98008-1328
Phone: 425-748-5200

Note: The Filing Id is 20170724111753D2971523